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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MI SUK YI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Case No. CV-09-8901 CAS
CR-03-406 (B) CAS

**ORDER DENYING PETITIONER'S
MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE
PURSUANT TO 28 U.S.C. § 2255**

I. BACKGROUND

On June 1, 2005, a jury found petitioner Mi Suk Yi guilty of conspiracy, bank fraud, social security fraud, and concealment money laundering. The jury also found against petitioner on two criminal forfeiture counts. On July 25, 2006, petitioner was sentenced to 97 months in prison and ordered to pay restitution. Petitioner appealed her conviction, claiming that (1) the Court should have ordered a hearing as to her competency; (2) the indictment was fatally varied or constructively amended; and (3) there was insufficient evidence to convict her. The Ninth Circuit affirmed her conviction in an unpublished memorandum disposition filed on August 6, 2009.

On December 4, 2009, Petitioner filed the instant motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a person in federal custody. Petitioner seeks a new trial. On January 19, 2010, the government filed its opposition. A reply

1 was filed on February 9, 2010. After carefully considering the arguments raised by the
2 petitioner, the Court hereby finds and concludes as follows.

3 **II. LEGAL STANDARD**

4 A motion pursuant to 28 U.S.C. § 2255 challenges a federal conviction and/or
5 sentence to confinement where a prisoner claims “that the sentence was imposed in
6 violation of the Constitution or laws of the United States, or that the court was without
7 jurisdiction to impose such sentence, or that the sentence was in excess of the maximum
8 authorized by law, or is otherwise subject to collateral attack.” Sanders v. United
9 States, 373 U.S. 1, 2 (1963).

10 Section 2255 provides that the Court shall conduct a hearing on a motion filed
11 thereunder “[u]nless the motion and files and records of the case conclusively show that
12 the [petitioner] is entitled to no relief.” Rule 8 of the Rules Governing § 2255
13 Proceedings provides that:

14 [i]f the motion has not been dismissed at a previous stage in the
15 proceeding, the judge, after the answer is filed and any transcripts or
16 records of prior court actions in the matter are in his possession, shall,
17 upon a review of those proceedings and of the expanded record, if any,
determine whether an evidentiary hearing is required. If it appears that an
evidentiary hearing is not required, the judge shall make such disposition
of the motion as justice dictates.

18 The decision whether to hold a hearing is “committed to the court’s discretion,”
19 and § 2255 “requires only that the judge give the prisoner’s claim careful consideration
20 and plenary processing, including a full opportunity for presentation of the relevant
21 facts.” Watts v. United States, 841 F.2d 275, 277 (9th Cir. 1988) (citation and internal
22 quotation marks omitted).

23 **III. DISCUSSION**

24 Petitioner states six grounds for her motion: (1) she received ineffective
25 assistance of counsel at trial because her counsel failed to object to erroneous jury
26 instructions; (2) her appellate counsel was ineffective for failing to argue on appeal that
27 the jury instructions were erroneous; (3) she received ineffective assistance of counsel
28 because her counsel failed to sever her trial from that of her co-defendant; (4) her
appellate counsel was ineffective for failing to argue on appeal that her trial should have

1 been severed from that of her co-defendant; (5) her trial counsel was ineffective for
2 either failing to call a witness and/or because a check was improperly admitted into
3 evidence; and (6) her trial counsel was ineffective for failing to request a new trial, and
4 appellate counsel was ineffective for “failure of raising the plain error review.” Each
5 ground for relief is taken in turn.

6 **Petitioner’s First Ground For Relief**

7 Petitioner argues that the jury instructions at her trial were erroneous as to the
8 mens rea and, accordingly, that her trial counsel was constitutionally ineffective for
9 failing to object. Mot. at Ground One. The Government responds that petitioner has
10 procedurally defaulted on the claim and cannot raise it now on collateral attack except
11 by establishing cause and prejudice, because petitioner did not raise this claim earlier
12 despite having two opportunities to do so – once at trial and once on direct appeal.
13 Opp’n at 2. The government contends that the petitioner has shown neither cause nor
14 prejudice, and thus that this claim should be rejected. Id.

15 Alternatively, the government argues that the jury instructions were entirely
16 correct on the merits. Id. 2-3. The Court instructed the jury that it was required to find
17 the following mens rea elements for the following crimes of conviction: (1) bank fraud:
18 the intent to defraud; (2) social security fraud: the intent to deceive as to defendant's
19 true identity; and (3) concealment money laundering: knowledge that (a) the property
20 involved in the financial transaction represented the proceeds of some form of prior
21 activity that constituted a felony under state or federal law; and (b) the transaction was
22 designed in whole or in part to conceal or disguise the nature, location, source,
23 ownership, or control of the proceeds of prior, separate criminal activity. Id.

24 The Government contends that these instructions were correct under the law. For
25 bank fraud, see 18 U.S.C. § 1344(1); 2A O’Malley, Grenig & Lee, Federal Jury Practice
26 and Instructions, 384-385, §47.11 (5th ed. 2000); United States v. Cloud, 872 F.2d 846,
27 850 (9th Cir. 1989). For social security fraud, see 42 U.S.C. § 408 (a)(6). For
28 concealment money laundering, see 9th Cir. Crim. Jury Instr. 8.121 (2000); United

1 States v. English, 92 F.3d 909 (9th Cir. 1996); United States v. Garcia, 37 F.3d 1359
2 (9th Cir. 1994); 18 U.S.C. §§ 1956 (a)(1)(B)(I), 1956(c)(4).

3 To obtain “collateral relief based on trial errors to which no contemporaneous
4 objection was made, a convicted defendant must show both (1) ‘cause’ excusing his
5 double procedural default, and (2) ‘actual prejudice’ resulting from the errors of which
6 he complains.” U.S. v. Frady, 456 U.S. 152, 167-68 (1982). To show “cause,” a
7 petitioner can show either “that some objective factor external to the defense impeded
8 counsel's efforts to comply with the State's procedural rule” or that “ineffective
9 assistance of counsel . . . is cause for a procedural default.” Murray v. Carrier, 477 U.S.
10 478, 488 (1986). However, so long as petitioner is “represented by counsel whose
11 performance is not constitutionally ineffective under the standard established in
12 Strickland v. Washington, we discern no inequity in requiring him to bear the risk of
13 attorney error that results in a procedural default.” Id. (internal citations omitted).

14 A petitioner arguing ineffective assistance of counsel under the Sixth
15 Amendment must show (1) that counsel’s representation fell below an objective
16 standard of reasonableness, and (2) that counsel’s deficient performance prejudiced the
17 petitioner. Roe v. Flores-Ortega, 528 U.S. 470, 476-77 (2000) (citing Strickland v.
18 Washington, 466 U.S. 668, 688, 695 (1984)). The presumption of reasonableness is
19 even “stronger for appellate counsel because he has wider discretion than trial counsel
20 in weeding out weaker issues; doing so is widely recognized as one of the hallmarks of
21 effective appellate assistance.” Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989).
22 Appellate counsel has “no constitutional duty to raise every non frivolous issue
23 requested by a petitioner.” Jones v. Barnes, 463 U.S. 745, 751-54 (1983). To show
24 “actual prejudice,” the petitioner must show “not merely that the errors at . . . trial
25 created a possibility of prejudice, but that they worked to his actual and substantial
26 disadvantage, infecting his entire trial with error of constitutional dimensions.” Id. at
27 493 (citing Frady, 456 U.S. at 170).

1 In the present case, the Court finds that petitioner has failed to show “cause”
2 excusing the double procedural default, and as such, finds that petitioner’s first ground
3 for relief lacks merit. While petitioner alleges ineffectiveness of counsel presumably as
4 justification for the procedural default, petitioner fails to show that her trial counsel was
5 ineffective under the standard established in Strickland v. Washington by specifically
6 stating why the jury instructions were objectionable. See Murray, 477 U.S. at 488.
7 Moreover, the Court finds that the jury instructions were correct on the merits. see 18
8 U.S.C. § 1344(1) (for bank fraud); see 42 U.S.C. § 408 (a)(6) (for social security fraud);
9 see also 18 U.S.C. §§ 1956 (a)(1)(B)(I), 1956(c)(4). Nor does petitioner allege that
10 there was some objective factor external to the defense that impeded counsel’s efforts to
11 comply with the State’s procedural rule. Id. As such, petitioner has not shown “cause”
12 excusing the double procedural default. See Frady, 456 U.S. at 167-68. Since the
13 Court finds that petitioner fails to show “cause,” the Court does not need to determine
14 whether there was “actual prejudice.” See McCleskey v. Zant, 499 U.S. 467, 502 (the
15 Court did not need to consider whether there was “actual prejudice” since the Court
16 found that there was no “cause” excusing procedural default).

17 **Petitioner’s Second Ground For Relief**

18 Secondly, petitioner argues that her appellate counsel was constitutionally
19 ineffective for failing to argue on appeal that the jury instructions at her trial were
20 erroneous. Mot. at Ground 2. The government contends that petitioner’s appellate
21 counsel would have had to raise a plain error argument on appeal since petitioner’s trial
22 counsel did not object to the jury instructions. Opp’n at 3-4. The government argues
23 that since the jury instructions were entirely correct on its merits, as noted above, the
24 Court did not err in giving the jury instructions, much less plainly err. Id.

25 In the present case, petitioner must show that her appellate counsel’s
26 representation fell below an objective standard of reasonableness for failing to appeal
27 the jury instructions. See Flores-Ortega, 528 U.S. at 476-77. Moreover, petitioner’s
28 appellate counsel has an even stronger presumption of reasonableness “because he has

1 wider discretion than trial counsel in weeding out weaker issues.” See Miller, 882 F.2d
2 at 1434. Additionally, as noted above, petitioner’s appellate counsel has no obligation
3 to raise every non frivolous issue. See Jones, 463 U.S. at 751. Petitioner fails to
4 specifically state why the jury instructions were deficient with respect to the mens rea
5 elements of her charged crimes, and accordingly, petitioner does not show that her
6 appellate counsel’s representation fell below an objective standard of reasonableness.
7 See Flores-Ortega, 528 U.S. at 476-77. For this reason, the Court finds that petitioner’s
8 second ground for relief lacks merit.

9 **Petitioner’s Third Ground For Relief**

10 Petitioner argues that her trial should have been severed from that of her co-
11 defendant and husband, Paul Amorello, and that, as such, her trial counsel was
12 constitutionally ineffective for failing to bring a motion to sever the trial. Mot. at
13 Ground Three. Petitioner argues that testimony from two bankers was only relevant to
14 her co-defendant and that the district court should have directed the jury with a limiting
15 instruction to that effect. Id. Petitioner also argues that a handwriting expert only
16 inculpated Amorello. Id. The government responds that first, petitioner procedurally
17 defaulted on this claim for failing to object at trial and raise the issue on appeal and that
18 petitioner has failed to show either cause or prejudice excusing the procedural default.
19 Opp’n at 4-5. Second, the government argues that a joint trial was substantively correct
20 because the testimony of the two bankers was relevant to petitioner since the bankers
21 established the banks’ losses caused by both defendants and that the testimony of the
22 handwriting expert, even if he was relevant only to Amorello, is not sufficient to
23 warrant severance under the law. Id.

24 It is well-established that in “the federal system there is a preference for joint
25 trials where defendants have been jointly indicted.” U.S. v. Hernandez-Orellana, 539
26 F.3d 994, 1001 (9th Cir. 2008). Under certain circumstances, “Federal Rule of Criminal
27 Procedure 14 provides relief from prejudicial joinder.” Id. (citing Fed. R. Cr. P. 14(a)
28 (stating “[i]f the joinder of . . . defendants in an indictment . . . appears to prejudice a

1 defendant . . . the court may . . . sever the defendants’ trials”)). The Court has
2 developed a four-part test to aid district courts: “(1) whether the jury may reasonably be
3 expected to collate and appraise the individual evidence against each defendant; (2) the
4 judge’s diligence in instructing the jury on the limited purposes for which certain
5 evidence may be used; (3) whether the nature of the evidence and the legal concepts
6 involved are within the competence of the ordinary juror; and (4) whether Appellants
7 could show, with some particularity, a risk that the joint trial would compromise a
8 specific trial right of one of the defendants, or prevent the jury from making a reliable
9 judgment about guilt or innocence.” Id. However, “it is not enough for a defendant to
10 show that separate trials would have created a better chance for acquittal.” United
11 States v. Baker, 10 F.3d 1374, 1388 (9th Cir. 1993) (overruled on other grounds by
12 United States v. Nordby, 225 F.3d 1053, 1059 (9th Cir. 2000)). “Nor is the fact that a
13 defendant is to be tried with a more culpable defendant enough to require severance.”
14 Id.

15 In the present case, the Court finds that petitioner defaulted on this claim and that
16 petitioner fails to show “cause” excusing the procedural default. Petitioner fails to show
17 “cause” by either demonstrating “that some objective factor external to the defense
18 impeded counsel’s efforts to comply with the State’s procedural rule” or that
19 “ineffective assistance of counsel . . . is cause for a procedural default.” See Murray v.
20 Carrier, 477 U.S. 478, 488 (1986). Even on the merits, petitioner fails to demonstrate
21 that her trial counsel was ineffective for not attempting to sever petitioner’s trial.
22 Petitioner must show that her trial counsel’s representation fell below an objective
23 standard of reasonableness when her trial counsel failed to attempt to sever the trial, and
24 she fails to do so here. See Flores-Ortega, 528 U.S. at 476-77. Petitioner fails to show
25 that the testimony of the bankers and the handwriting expert was only relevant to her
26 co-defendant. Furthermore, even if true, petitioner fails to justify that severance of the
27 trial should have occurred because “the fact that more evidence is introduced against a
28 co-defendant is insufficient to show that joinder was improper.” See United States v.

1 Matta-Ballesteros, 71 F.3d 754, 771 (9th Cir. 1995). For the above reasons, the Court
2 finds that petitioner's third ground for relief lacks merit.

3 **Petitioner's Fourth Ground For Relief**

4 Petitioner argues that her appellate counsel was ineffective for failing to argue on
5 appeal that her trial should have been severed. Mot. at Ground Four.

6 The Court finds that petitioner fails to adequately show that her appellate
7 counsel's representation fell below an objective standard of reasonableness.

8 Petitioner's appellate counsel has a stronger presumption of reasonableness "because he
9 has wider discretion than trial counsel in weeding out weaker issues." See Miller, 882
10 F.2d at 1434. Furthermore, petitioner's appellate counsel has no constitutional duty to
11 raise every non frivolous issue requested by the petitioner. See Jones, 463 U.S. at 751.
12 As previously discussed, petitioner has failed to show that her trial should have been
13 severed, and thus has failed to show that her appellate counsel was ineffective by not
14 raising this argument. See Miller, 882 F.2d at 1428. Accordingly, the Court finds that
15 petitioner's fourth ground for relief lacks merit..

16 **Petitioner's Fifth Ground For Relief**

17 Petitioner appears to argue ineffective assistance on the part of her trial counsel
18 because (1) her trial counsel should have called Casey Baik as a witness, and (2) a
19 check was improperly admitted into evidence.¹ Mot. at Ground Five. The government
20 argues that petitioner makes no showing of how, or even whether, Baik would have
21 helped her defense, and therefore, no showing that her trial counsel was ineffective.
22 Opp'n at 5. Regardless, the government argues that petitioner's trial counsel called
23 United States Secret Service Special Agent William Min as a witness, and petitioner's
24 trial counsel questioned him extensively about Baik. Id. Thus, even if petitioner's trial
25 counsel was ineffective for not calling Baik, petitioner suffered no prejudice as a result.
26 Id. Furthermore, the government contends that the check was properly admitted into
27 evidence under the business records exception to the hearsay rule; the government
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¹ Petitioner's fifth ground for relief is difficult to discern.

1 argues that the admission of the check did not depend on Baik testifying, as he was not
2 needed to authenticate it. Id. at 5-6.

3 The Court finds that petitioner has failed to show that her trial counsel was
4 ineffective by reason of his failure to call Baik as a witness or because a check was
5 improperly admitted into evidence. See Flores-Ortega, 528 U.S. at 476-77. Petitioner
6 does not state how Baik would have assisted with her defense, let alone how his
7 testimony would have influenced the outcome of this case, and accordingly, does not
8 demonstrate that her trial counsel's representation fell below an objective standard of
9 reasonableness. See id. Petitioner also does not state why the check was not properly
10 admitted into evidence. See id. For these reasons, the Court finds that petitioner's fifth
11 ground for relief lacks merit.

12 **Petitioner's Sixth Ground For Relief**

13 Petitioner appears to argue that her trial counsel was ineffective for failing to
14 object and request a new trial; and, she also appears to state that her appellate counsel
15 was ineffective for not raising plain error review, though she does not state specifically
16 as to what issue.² Mot. at Ground Six. The Court finds that petitioner is unable to show
17 that her trial counsel fell below an objective standard of reasonableness because it is not
18 clear what grounds petitioner's trial counsel should have raised in order to obtain a new
19 trial. Id. Furthermore, this Court finds that petitioner is unable to show that her
20 appellate counsel was ineffective under appellate counsel's higher standard of
21 reasonableness because petitioner does not specify what issue appellate counsel failed
22 to raise. See Miller, 882 F.2d at 1428. Accordingly, the Court finds that petitioner's
23 sixth ground for relief lacks merit.

24 **IV. CONCLUSION**

25 Having duly considered petitioner's arguments, the Court finds that the record
26 shows conclusively that petitioner is not entitled to the requested relief. The Court
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28 ² Petitioner's last ground for relief is very difficult to discern.

1 concludes that an evidentiary hearing is not required to adjudicate this matter. In
2 accordance with the foregoing, petitioner's motion is hereby DISMISSED.

3 IT IS SO ORDERED.

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5 Dated: May 20, 2010

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8 CHRISTINA A. SNYDER
9 United States District Judge
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